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SUPREME COURT, U.S.

OCTOBER TERM, 1995

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44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,
Petitioners,

v.

STATE OF RHODE ISLAND and
RHODE ISLAND LIQUOR STORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. State and local governments have always been vitally concerned with protecting the health and well-being of their citizens and possess broad police powers to legislate towards those ends. Specifically, States have historically had extremely broad power to regulate alcohol—a substance of tremendous destructive potential.

This Court, in applying the four-part test for regulation of commercial speech set forth in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), has consistently recognized that reasonable minds may differ as to the best approach to complex societal problems. *See, e.g., United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2704 (1993). Accordingly, a legislature need not show that a regulatory measure touching on commercial speech is a perfect or uncontroversial solution —a showing that is frequently impossible. Petitioners urge a reading of *Central Hudson* which ignores this reality, insisting instead that a legislature attain absolute certainty and produce uncontroverted empirical proof before proceeding with any restriction on commercial speech. Such an approach, which is at odds with this Court's holdings, would severely constrain States in their efforts to address important social problems.

The dangers associated with constricting States' legislative powers through an erroneously narrow application of the *Central Hudson* test are magnified in this case, since the regulation at issue involves an extraordinarily dangerous product—alcohol. *See Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939); *Queensgate Inv. Co. v. Liquor Control Comm'n*, 433 N.E.2d 138, 141-42 (Ohio), *appeal dismissed*, 459

U.S. 807 (1982). The devastating, often deadly, effects of alcohol abuse are well known. *See, e.g.*, U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1993* 349 (Table 3.104) (1994) (of 39,235 motor vehicle fatalities in 1992, approximately 45% were alcohol-related). Rhode Island, like other States, has sought to alleviate the severe problems resulting from alcohol abuse by regulating liquor advertising. *See* Br. of Resp. Rhode Island at 9 n.5.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

SUMMARY OF ARGUMENT

1. Because the Rhode Island alcohol price advertising restriction at issue in this case limits pure commercial speech, its validity turns on the application of the four-part test set forth in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). The parties have stipulated that the statute limits speech which is not misleading and which does not involve illegal activity, and that Rhode Island's stated interest—"the promotion of temperance," R.I Gen. Laws § 3-1-5—is "substantial." Thus, only the last two prongs of *Central Hudson*'s test are at issue: whether the regulation "directly and materially" advances Rhode Island's interest in promoting temperance; and whether the regulation is "narrowly tailored" to achieve that objective. The statute clearly satisfies these two prongs, as they have been interpreted by this Court.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Petitioners' contention that Rhode Island's alcohol price advertising restriction does not "directly advance" the goal of temperance is premised on a reading of that requirement that cannot be squared with the Court's opinions. Recognizing that the complicated, intractable problems which legislatures regularly face are rarely susceptible of easy or uncontroversial solutions, this Court has not required a legislature to demonstrate that a particular measure is guaranteed to work perfectly or that it is unanimously endorsed by experts in the field. Instead, the Court has required that the legislature have some evidentiary basis beyond "mere speculation and conjecture," *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993), upon which it could base a reasonable belief in the efficacy of the regulation. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986); *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2704 (1993).

Without question, the Rhode Island legislature has met this burden. The Court has consistently viewed as reasonable a legislature's belief that restricting advertising of a commodity will decrease consumption of that commodity. *See, e.g., Posadas*, 478 U.S. at 341-42; *Edge*, 113 S.Ct. at 2704. The evidence presented by Rhode Island provided an ample basis for making a similar "commonsense judgment" here. *See Edge*, 113 S.Ct. at 2704.

Petitioners' contentions with respect to *Central Hudson*'s requirement that the regulation be "narrowly tailored" suffer from a similar defect. A legislature need not consider every imaginable alternative or prove that the one it selected is the least restrictive of speech. Instead, a regulation need only

be "reasonably well-tailored to its stated objective." *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2380 (1995). The Rhode Island statute, which is targeted at a single element within alcohol advertising, easily meets this requirement.

2. An advertising restriction is a constitutionally permissible means of addressing overconsumption of a socially harmful commodity which the State has the power to prohibit entirely. Without question, States enjoy extraordinary regulatory power over alcohol. Indeed, States' broad police powers with respect to alcohol predate the Twenty-first Amendment and exist independent of the powers granted therein. Because alcohol is a potentially harmful commodity which the State could ban entirely, the State may choose instead to limit efforts to stimulate demand for it.

Nor does the inapt charge of "paternalism" call the legitimacy of such a measure into question. There is nothing "paternalistic" about a State's efforts to prevent citizens from engaging in conduct, such as alcohol abuse, which directly harms others and imposes immense costs on society. It is a fundamental function of government that when individuals make socially harmful decisions, the government may use means at its disposal to alter those decisions—including, in appropriate cases, restrictions on commercial speech.

ARGUMENT

I. RHODE ISLAND'S LIMITATION ON ALCOHOL PRICE ADVERTISING SATISFIES *CENTRAL HUDSON*

At issue in this case are limitations placed on petitioners' ability to engage in price advertising of alcohol, a form of pure commercial speech "which does 'no more than propose a commercial transaction.' " *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)). As the Court reaffirmed this past Term, such " '[c]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impossible in the realm of noncommercial expression.' " *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2375 (1995) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)); *see also Edge*, 113 S.Ct. at 2703. Accordingly, the alcohol price advertising restriction at issue here is subject to " 'intermediate' scrutiny . . . under the framework set forth in *Central Hudson*." *Went For It*, 115 S.Ct. at 2375-76 (citation omitted).

With respect to *Central Hudson*'s threshold inquiry, the parties agree that the price advertising at issue is not misleading and does not concern unlawful activity. Pet. App. 43a; *see Central Hudson*, 447 U.S. at 563-64. The Court in *Went For It* restated the remaining portions of the *Central Hudson* test as follows:

> Commercial speech that falls into neither of those categories [speech that concerns unlawful activity or is misleading], may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be " 'narrowly drawn.' "

115 S.Ct. at 2376 (quoting *Central Hudson*, 447 U.S. at 564-65).

The parties have further stipulated that Rhode Island's interest in combatting alcohol abuse and promoting temperance is "substantial" under *Central Hudson*. Pet. App. 43. Thus, the constitutionality of Rhode Island's alcohol price advertising restriction turns on the final two prongs of *Central Hudson*: the restriction must "directly and materially advance[]" the State's interest, and the restriction must be "narrowly drawn." As *amici* demonstrate below, Rhode Island's statute satisfies both of these requirements.

A. The Price Advertising Restriction "Directly and Materially" Advances Rhode Island's Interest in Temperance

The starting point for assessing whether the State's interest is directly and materially advanced by the regulation is to "identify with care the interests the State itself asserts," because "[u]nlike rational basis review, the *Central Hudson* standard does not permit [a court] to supplant the precise interests put forward by the State with other sup-

positions." *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993). The interest asserted by Rhode Island in support of the legislation is straightforward: "the promotion of temperance." R.I. Gen. Laws § 3-1-5. Thus, the question under this prong of *Central Hudson* is whether this asserted interest—the promotion of temperance—is directly and materially advanced by the legislation at issue.[2]

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[2] Petitioners and their *amici* have sought to introduce an additional element into this inquiry by suggesting that Rhode Island's asserted interest in temperance was not the true motive for the legislation. Pet. Br. 21; Br. *Am. Cur.* Ass'n of Nat'l Advertisers *et al.* 20-21. This is a red herring. This Court's opinions make clear that speculation as to possible unstated motives for legislation has no place in the *Central Hudson* analysis. *See Edenfield*, 113 S.Ct. at 1798. As the Court explained in *Edenfield*, the requirement that the legislation directly advance the *asserted* interest provides the necessary check against subterfuge and pretext: "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." 113 S.Ct. at 1800. *Central Hudson* does not call upon courts to conduct independent investigations into the hearts and minds of individual legislators to divine possible hidden motivations. It simply requires that the asserted interest be directly advanced by the legislation.

Moreover, the Rhode Island Supreme Court, which has upheld the validity of the challenged statute, did not make any finding that would support the existence of an ulterior motive. *See Rhode Island Liquor Stores Ass'n v. The Evening Call Publishing Co.*, 497 A.2d 331 (R.I. 1985); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 351 (1987) ("We . . . accord 'great weight to the views of the State's highest court' on state-law matters, and customarily accept the factual findings of state courts in the absence of exceptional circumstances.") (citations omitted).

A number of recent decisions have fleshed out the meaning of this requirement. Petitioners' contentions to the contrary, the test plainly does not require that a State produce uncontroverted, conclusive empirical evidence that its asserted interest will be directly and materially advanced. While the test "is not satisfied by mere speculation or conjecture," *Edenfield*, 113 S.Ct. at 1800, neither does it require production of evidence of a quality and quantity that might be necessary to convince a trier of fact of the truth of a particular matter. It requires only a basis sufficient to support a reasonable belief on the part of the legislature as to the measure's efficacy. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), for example, the Court upheld a restriction on the advertising of casino gambling, explaining that

> [t]he Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one[.]

Id. at 341-42. *See also Fox*, 492 U.S. at 480 (*Central Hudson* requires "a fit [between legislative means and ends] that is not necessarily perfect, but reasonable.").

Far from imposing a requirement that exhaustive empirical data be presented to support a restriction on commercial speech, the Court has deferred to a legislature's "commonsense judgment" as to a measure's likely effects. *Edge*, 113 S.Ct. at 2704; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S.

490, 509 (1981) (plurality opinion). While "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law,'" *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445, 2471 (1994) (plurality opinion) (citations omitted), "[t]his obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace [the legislature's] factual predictions with our own. Rather, it is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Id.* (plurality opinion); *see also id.* at 2473 n.1 (Stevens, J., concurring).

There are compelling practical reasons for this approach. Courts are much less suited than legislatures to sort through the available evidence and make precise predictions in areas where predictions of any kind are difficult. In *Turner*, Justice Kennedy explained as follows the need for deference to the legislature:

> [C]ourts must accord substantial deference to the predictive judgments of Congress. . . . Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, Congress is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon an issue as complex and dynamic as that presented here.

Id. at 2471 (plurality opinion) (internal citations omitted); *see also id.* at 2472 (Blackmun, J., con-

curring) (emphasizing "the paramount importance of according substantial deference to the predictive judgments of Congress"); *id.* at 2473 & n.1 (Stevens, J., concurring).

Thus, "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because [appellant] casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973), *cited in Turner*, 114 S.Ct. at 2471 (plurality opinion); *see also Metromedia*, 453 U.S. at 509 (plurality opinion) ("[w]e . . . hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts" given that "[t]here is nothing here to suggest that these judgments are unreasonable").

The considerations which require judicial deference to legislative bodies are plainly involved here. Economic predictions are notoriously difficult to make, as Justice Stevens noted in his concurrence in *Turner*:

> Economic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effect of legal rules in complex conditions. Whether Congress might have accomplished its goals more efficiently through other means; whether it correctly interpreted emerging trends in the protean communications industry; and indeed whether must-carry is actually imprudent as a matter of policy will remain matters of debate long after the 1992 Act has been repealed or replaced by successor legislation.

114 S.Ct. at 2473 (Stevens, J., concurring) (footnote omitted).

The uncertainty attending economic predictions is especially acute when economists attempt to determine the effect of adding or deleting one particular item of information, such as price, from the mix of information otherwise available to consumers. In *Virginia Pharmacy Board*, 425 U.S. at 765 n.20, the Court recognized that "[t]he task of predicting the effect that a free flow of drug price information would have on the production and consumption of drugs is a hazardous and speculative one." Such determinations are highly problematic because they require insight into consumer demand in hypothetical situations. *See generally* William Baumol, "The Empirical Determination of Demand Relationships," in *Microeconomics: Selected Readings* 55 (Edwin Mansfield, ed., 3d ed. 1979) (discussing difficulty of evaluating impact of factors such as advertising on consumer demand).

The lack of certainty attending economic predictions as to consumer behavior in the present case was emphasized by both the court of appeals and the district court. *See* Pet. App. 6 (opinion of court of appeals) (noting that expert opinion is divided on effects of price advertising, and that " 'advertising has cumulative effects that are difficult to detect in studies, and that research studies have been varied and equivocal because it is a difficult topic to research' ") (quoting plaintiffs' expert); Pet. App. 22 (opinion of district court) ("not[ing] a pronounced lack of unanimity among researchers who have studied the effects of alcohol advertising. No less than twelve different conclusions have been reached regarding the impact of advertising on the general consumption of alcoholic beverages.") (citing Tr. 3/11/93 at 50-51).

Such a lack of consensus does not, however, consign the legislature to paralysis. Any difficult and complicated social issue will engender differing views and will inevitably be the subject of contradictory and inconclusive expert opinions and studies. The existence of countervailing evidence does not in itself impugn the reasonableness of a legislature's judgment about the link between advertising and consumption. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984), for example, the Court observed that "[a]lthough the District Court found that 'consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages,' we may nevertheless accept Oklahoma's judgment that restrictions on liquor advertising represent at least a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State." (citation omitted).

Nor should a court wade through competing technical information to decide the truth of the matter for itself. Instead, a court is charged with the far more limited task of determining whether some evidence exists upon which a legislature could base a reasonable belief in the efficacy of its solution, whether that evidence is empirical, anecdotal, or derived from precepts of common sense. *See Posadas*, 478 U.S. at 341-42; *Edge*, 113 S.Ct. at 2704-2705; *see also Turner*, 114 S.Ct. at 2473 (Stevens, J., concurring) ("the question for us is merely whether *Congress* could fairly conclude that cable operators' monopoly position threatens the continued viability of broadcast television and that must-carry is an appropriate means of minimizing that risk").

Only in the absence of such evidence may a court strike down legislation under *Central Hudson*'s third prong. *See Went For It*, 115 S.Ct. at 2377 (noting that in *Edenfield* the Court rejected a limitation on speech only after finding *no* evidence of any kind (not even anecdotal) that would suggest a connection between the regulation and the cited interest; indeed, the only evidence presented tended to disprove the existence of such a connection) (citing *Edenfield*, 113 S.Ct. at 1800); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648 (1985) ("nowhere does the State cite any evidence or authority of any kind").[3]

Here, there is an evidentiary basis sufficient to support a legislative belief that a limitation on price advertising would promote temperance. *See* Br. Resp. Rhode Island 21-28. Indeed, the Court has consistently viewed as reasonable a legislature's belief that decreasing advertising of a socially harmful commodity will decrease consumption of that commodity. For example, in *Posadas* the Court found reasonable the legislature's apparent belief that banning casino gambling advertising directed at residents would reduce gambling on their part. 478 U.S. at 341-42. Similarly, in *Central Hudson* the Court recognized that "[t]here is an immediate connection between advertising and demand for electricity." 447 U.S. at 569. *See also Edge*, 113 S.Ct. at 2704 (Court had "no doubt" that banning of ads by stations licensed by a State would support State's anti-gambling policy).

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[3] A legislative scheme that pursues internally inconsistent objectives will also be struck down. *See Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1592-93 (1995).

This Court has credited the presumed relationship between advertising and demand even where the limitation on advertising is incomplete, or where there is reason to believe that the effects of the measure will be diluted by information emanating from other sources. As the Court explained in *Edge*:

> Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.

113 S.Ct. at 2707 (citations omitted). The Court in *Edge* went on to conclude:

> If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Id.

Likewise, courts have upheld advertising regulations similar to Rhode Island's under *Central Hudson*; these decisions have, in turn, been cited with approval by this Court. For example, in *Queensgate*

Inv. Co. v. Liquor Control Comm'n, 433 N.E.2d 138, 142 (Ohio), *appeal dismissed*, 459 U.S. 807 (1982), the Ohio Supreme Court upheld a ban on alcohol price advertising, finding that "[t]he advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption." *See Dunagin v. City of Oxford*, 718 F.2d 738, 750 (5th Cir. 1983) (en banc) ("we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the [liquor advertising] ban, whether or not 'concrete scientific evidence' exists to that effect"), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 501 (10th Cir. 1983) ("prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems"), *rev'd on other grounds*, 467 U.S. 691 (1984); *see also Edge*, 113 S.Ct. at 2707 (citing *Queensgate*); *Posadas*, 478 U.S. at 347 n.10 (citing *Queensgate*, *Dunagin*, and *Crisp*).

In sum, it is clear that the Rhode Island legislature had a sufficient foundation upon which it could base its reasonable belief that the alcohol price advertising ban would promote temperance. Accordingly, under this Court's precedents, the regulation satisfies the requirement that it "directly and materially advance" that interest.

F. Rhode Island's Restriction Is "Narrowly Drawn"

The fourth prong of the *Central Hudson* test, as originally formulated, required that a regulation be "no more extensive than necessary." 447 U.S. at

569-70. It is now well settled, however, that this does not equate to a "least restrictive means" analysis:

> What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds, we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480 (citations omitted). *See also Went For It*, 115 S.Ct. at 2380 (restriction on commercial speech must be "narrowly tailored," or "*reasonably* well-tailored to its stated objective") (emphasis added); *Edge*, 113 S.Ct. at 2705 (in analyzing fourth prong of *Central Hudson*, "our commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable").

In rejecting a least restrictive means analysis, the *Fox* Court emphasized the deference that courts must accord a legislature's choice of means. 492 U.S. at 480-81. For example, in *Posadas* the Court upheld a ban on casino gambling advertising directed at Puerto Rican residents without inquiring as to whether less restrictive means (such as "counter-speech") could have served the same purpose:

> We think it is up to the legislature to decide whether or not such a "counterspeech" policy

> would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.

Posadas, 478 U.S. at 344. *See also Fox*, 492 U.S. at 479 ("it was 'up to the legislature to decide' that point, so long as its judgment was reasonable") (quoting *Posadas*, 478 U.S. at 344).

The Rhode Island legislature could reasonably have made the judgment that more direct methods of reducing the consumption of alcohol, such as fixing a minimum price or adding a tax, would not be as effective in achieving their goals. This conclusion is patently reasonable, especially given the fact that Rhode Island is a small state whose residents can readily cross the state line to avoid any such measures. Nor was Rhode Island required to exhaust other methods of combatting alcohol abuse, such as stepped-up attempts at educating consumers about the risks of alcohol. Instead, it was justified in choosing to restrict advertising, which is a well established method of combatting the consumption of socially harmful products. Rhode Island narrowly tailored its restriction to focus on the one aspect of advertising—the advertising of price advantages—which it found to be most directly linked to greater consumption. *Central Hudson*'s fourth prong does not require more.

II. AN ADVERTISING RESTRICTION IS A CONSTITUTIONALLY PERMISSIBLE MEANS OF REGULATING A SOCIALLY HARMFUL PRODUCT OR ACTIVITY OVER WHICH THE STATE HAS EXTRAORDINARY CONTROL AND WHICH IT COULD BAN COMPLETELY

A. Alcohol Is a Unique Product Over Which States Historically Have Had Extraordinary Control

Like gambling in *Posadas*, the sale of alcohol is a highly regulated activity which a State could ban entirely. The devastating effects of alcohol abuse are well known. Data for the year 1992 indicates that nearly half (45.1%) of all motor vehicle fatalities involved alcohol. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1993* 349 (Table 3.104) (1994). Alcohol is also a factor in a large percentage of other accidental deaths, including falls, drownings, and burn-related fatalities, as well as a large proportion of homicides and suicides. *See* U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* 234, 237, 243, 246 (1993). In 1992, over 3 million arrests were made for alcohol-related offenses, *Sourcebook of Criminal Justice Statistics - 1993* at 456 (Table 4.32), and data for the year 1990 estimates the total cost of alcohol abuse and dependency at $98.6 billion. Dorothy P. Rice, *The Economic Cost of Alcohol Abuse and Alcohol Dependence: 1990*, 17 Alcohol Health & Research World 10 (1993).

Without question, States enjoy extraordinary regulatory power over commerce in alcohol. *See, e.g., North Dakota v. United States*, 495 U.S. 423, 433 (1990) (plurality opinion) ("Given the special protection afforded to state liquor control policies by the

Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."); *id.* at 431 ("within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system") (citing *Central California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 356 (1987) (O'Connor, J., dissenting) ("The history of the Amendment strongly supports Justice Black's view that the Twenty-first Amendment was intended to return absolute control of the liquor trade to the States.").

While the Twenty-first Amendment is the most conspicuous manifestation of the States' broad powers over alcohol, "[t]he police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971); *see also Rice v. Rehner*, 463 U.S. 713, 724 (1983) ("The State has an unquestionable interest in the liquor traffic that occurs within its borders, and that interest is independent of the authority conferred on the States by the Twenty-first Amendment."). For example, in *Crane v. Campbell*, 245 U.S. 304 (1917), the Court explained that

> It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment.

> As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective.

Id. at 307 (citations omitted); *see also Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 320 (1917) ("That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open.").[4]

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[4] Because the State could ban alcohol entirely, petitioners' contention that Rhode Island's price advertising regulation violates the First Amendment under the doctrine articulated in *Bigelow v. Virginia*, 421 U.S. 809 (1975), *see* Pet. Br. 24-26, is without merit. Petitioners argue that *Bigelow* prohibits a State from regulating any commercial speech occurring within its borders which emanates from an out-of-state advertiser and relates to products or services legal in other States.

In *Posadas*, however, the Court indicated that the *Bigelow* doctrine was applicable only to speech concerning goods and services to which a constitutional right attaches—certainly not to "vices" which a State has the power to ban altogether. *See* 478 U.S. at 345-46. Any lingering doubts as to the applicability of *Bigelow* to commercial speech regarding "vices" legally taking place in other States was categorically laid to rest in *Edge*. There, the Court upheld a ban on broadcast advertising of lotteries within the borders of a non-lottery State, even though the advertising related to legal lotteries held in an adjoining State. *See Edge*, 113 S.Ct. at 2700-08. Although the majority did not expressly address the *Bigelow* doctrine, it upheld the advertising ban over the dissent's objection that *Bigelow* forbids "suppressing truthful, nonmisleading information regarding a legal activity in another State." *Edge*, 113 S.Ct. at 2709 (Stevens, J., dissenting). The *Edge* Court emphasized that, "[a]s in *Posadas*, the ac-

It is, of course, beyond dispute that this broad power to prohibit alcohol includes equally broad powers to regulate short of prohibition. The Court elaborated on this point in *Ziffrin, Inc. v. Reeves*:

> Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. . . . The state may protect her people against evil incident to intoxicants and may exercise large discretion as to means employed.

308 U.S. 132, 138-39 (1939) (citations omitted).

Throughout history, governments have sought to use such regulatory power over alcohol to combat its tragic effects:

> For centuries peoples of many countries have sought to prevent or eliminate the hazards that are privy to the unregulated manufacture, sale and distribution of alcoholic beverages. The pages of history contain considerable evidence that the public interest requires governmental regulation of the alcohol beverage business . . . .

The Joint Committee of the States to Study Alcoholic Beverage Laws, *Alcoholic Beverage Control* 4 (1960).[5]

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tivity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *Id.* at 2703 (citation omitted).

[5] *See also* Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959) ("Controls imposed

Specifically, there is a longstanding history of state regulation of alcohol advertising: "[A]lthough federal law establishes minimum labeling and advertising requirements, many states have additional requirements which are applicable to all liquor sold or advertised in the state." *Economic Localism*, 72 Harv. L. Rev. at 1149 (footnotes omitted).

B. The Court Has Consistently Upheld Advertising Regulations Where Harmful Products Or Activities Are Involved

In *Posadas*, the Court reaffirmed that a legislature may choose to combat consumption which it deems socially harmful through indirect measures such as restrictions on advertising of the harmful product or service:

> Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. . . . [I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.

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by every state upon various phases of the alcoholic-beverage industry, from manufacture to distribution and ultimate consumption, make it one of the most highly regulated of all business activities."); Joint Committee, *Alcohol Beverage Control* at 4 ("[T]he alcoholic beverage business is *sui generis*, and . . . it must be considered and treated differently than every other business.").

478 U.S. at 346; *see Edge*, 113 S.Ct. at 2703-05. Indeed, a contrary rule would be difficult to understand:

> It would . . . . surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand. To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Posadas, 478 U.S. at 346-47 (citations and footnote omitted).[6]

As the Court noted in *Posadas*, there are many examples of restrictions on advertising at both the federal and state level to reduce demand for socially harmful products. *See Posadas*, 478 U.S. at 347 & n.10 (citing a number of such advertising restric-

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[6] *Cf. New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717 (1981) (per curiam) ("The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."); *Seaboard Air Line Ry. v. State of North Carolina*, 245 U.S. 298, 304 (1917) ("The challenged act instead of interposing an absolute bar against all such shipments [of alcohol], as it was within the power of the State to do, in effect permitted them upon conditions . . . . The greater power includes the less.").

tions, including 15 U.S.C. § 1335, which bans cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission," and Ohio Rev. Code Ann. §§ 4301.03(E), 4301.211 (1982), which prohibit off-premises advertising of beer prices); *see also Edge*, 113 S.Ct. at 2700-01 (discussing history of federal regulation of lottery advertising). *See also* 27 U.S.C. § 215 (requiring alcohol warning labels). Likewise, in *Central Hudson* the majority assumed that an advertising restriction could be a permissible means to decrease demand for a commodity (energy), where overconsumption of that commodity during an energy crisis was socially harmful. *See* 447 U.S. at 573-74 (Blackmun, J., concurring).

Nor is the legitimacy of such measures called into question by resort to the inapt and highly pejorative label "paternalism." There is nothing paternalistic about a State's efforts to prevent citizens from engaging in conduct, such as alcohol abuse, which directly harms others. *See* p. 19, *supra*. The exercise of the police powers is always suffused with the notion that when decisions of individuals harm society, society can use means at its disposal to alter those decisions—including, in appropriate cases, restrictions on commercial speech. When private decisions influenced by such commercial speech are affirmatively harmful to others, it is inappropriate to insist that government sit back and wait for "the marketplace of ideas" to sort things out. As then-Justice Rehnquist explained in dissent in *Central Hudson*, "[t]here is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in

the commercial market." 447 U.S. at 592 (Rehnquist, J., dissenting).

In any event, the charge of "paternalism" is not itself a legitimate basis for invalidating legislation. This point was emphasized by the Court in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985):

> It is not for the District Court or any other federal court to invalidate a federal statute by so cavalierly dismissing a long-asserted congressional purpose. If "paternalism" is an insignificant Government interest, then Congress first went astray in 1792, when by its Act of March 23 of that year it prohibited the "sale, transfer or mortgage . . . of the pension . . . [of a] soldier . . . before the same shall become due." Acts of Congress long on the books, such as the Fair Labor Standards Act, might similarly be described as "paternalistic"; indeed, this Court once opined that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual. . . ." *Lochner v. New York*, 198 U.S. 45 (1905). That day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal.

Id. at 323 (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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